In The

Supreme Court of the United States

October Term, 1973

No. 73-1309

JEFFREY COLE BIGELOW,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS OR AFFIRM

ANDREW P. MILLER
Attorney General

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
Assistant Attorney General

Supreme Court–Library Building
1101 East Broad Street
Richmond, Virginia 23219

Attorneys for Appellee

TABLE OF CONTENTS

Page

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS 2

QUESTIONS PRESENTED 2

STATEMENT 3

ARGUMENT:

I. A State, Exercising Its Police Powers To Protect The Health, Safety And Welfare Of Its Citizens, May Prohibit Commercial Advertisements Of Commercial Abortion Referral Agencies. 7

II. A Person, Whose Conduct Was Of A Purely Commercial Nature And Therefore Within The Hard Core Of Activity Prohibited By A Statute And Not Protected By The First Amendment, Does Not Have Standing To Raise The Hypothetical Rights Of Others Who Cannot Possibly Be Affected Because The Statute, Even Prior To Its Amendment, Was Authoritatively Construed To Forbid Only Commercial Activity. 9

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF CITATIONS

Cases

Banzhof v. FCC, 405 F.2d 1082 (1968), cert. denied, sub nom., Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969) 8

Breard v. City of Alexandria, 341 U.S. 622 (1951) 10

Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973) 10

Capital Broadcasting Co. v. Mitchell, 333 F.Supp. 582 (D. D.C. (1971), aff'd sub nom., Capital Broadcasting Co. v. Acting Attorney General, 405 U.S. 1000 (1972) 8

Page

Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) 10

Coates v. City of Cincinnati, 402 U.S. 611, 620 (1971) 11

Doe v. Bolton, 410 U.S. 179 (1973) 6

New York State Broadcasters Association v. United States, 414 F.2d 990 (2nd Cir. 1969), cert. denied, 396 U.S. 1061 (1970) 8, 9

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 413 U.S. 376 (1973) 8

Roe v. Wade, 410 U.S. 113 (1973) 6, 7

Semler v. Dental Examiners, 294 U.S. 608 (1935) 6, 8, 9

S.P.S. Consultants, Inc. v. Lefkowitz, 333 F.Supp. 1373, 1377 (S.D. N.Y. 1971) 9

State v. Abortion Information Agency, Inc., 323 N.Y.S.2d 597, 600 (1971) 9

State v. Mitchell, 312 N.Y.S.2d 756, 761 (1971) 9

Tobacco Institute, Inc. v. FCC, 396 U.S. 842 (1969) 8

United States v. Hunter, 159 F.2d 205, 212 (4th Cir. 1972), cert. denied, 409 U.S. 934 8

United States v. Thirty-seven Photographs, 402 U.S. 363 (1971) 10

Valentine v. Christensen, 316 U.S. 52 (1942) 8

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 8

Constitutional Provision

United States Constitution
First Amendment ..... Passim

Federal Statute

28 U.S.C.A. § 1257(2) 2

State Statute

Virginia Code, Section 18.1-63 ..... Passim

In The

Supreme Court of the United States

October Term, 1973

No. 73-1309

JEFFREY COLE BIGELOW,
Appellant,

v.

COMMONWEALTH OF VIRGINIA,
Appellee.

On Appeal from the Supreme Court of Virginia

MOTION TO DISMISS OR AFFIRM

For the reasons hereafter stated, the Appellee respectfully submits that this Court should dismiss this appeal on the ground that it does not present a substantial federal question, or that this Court should affirm the judgment below on the ground that it is manifest that the questions on which the decision of this cause depend are so unsubstantial as not to need further argument.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia entered upon remand from this Court is reported at 214 Va. 341, 200 S.E.2d 680 and is set forth in the Appendix to Appellant's Jurisdictional Statement at pp. 21a-22a. The order

of this Court vacating the earlier decision of the court below and remanding the case for further consideration is reported at 413 U.S. 909 and is set forth in the Appendix to Appellant's Jurisdictional Statement at p. 20a. The earlier opinion of the Supreme Court of Virginia is reported at 213 Va. 191, 191 S.E.2d 173 (1972) and is set forth in the Appendix to Appellant's Jurisdictional Statement at pp. 1a-11a. The judgment of conviction in the Circuit Court, Albemarle County, Virginia, is not reported and is set forth in the Appendix to Appellant's Jurisdictional Statement at pp. 14a-15a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2). The statement was timely filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances." U. S. Const. Amend. I.

* * *

"If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor." Va. Code Ann. § 18.1-63.

QUESTIONS PRESENTED

1. Whether a state, exercising its police powers to protect the health, safety and welfare of its citizens, may prohibit commercial advertisements of commercial abortion referral agencies?

2. Whether a person, whose conduct was of a purely commercial nature and therefore within the hard core of activity prohibited by a statute and not protected by the First Amendment, has standing to raise the hypothetical rights of others who cannot possibly be affected because the statute, even prior to its amendment, was authoritatively construed to forbid only commercial activity?

STATEMENT

The Appellant was a director, managing editor and responsible officer of the Virginia Weekly, a newspaper distributed in the Charlottesville area. The February 8, 1971, issue of the Virginia Weekly, which was published and circulated in Albemarle County, Virginia, carried the following advertisement on page 2:

UNWANTED PREGNANCY
LET US HELP YOU

Abortions are now legal in New York.
There are no residency requirements.

FOR IMMEDIATE PLACEMENT IN ACCREDITED HOSPITALS AND CLINICS AT LOW COST

Contact

WOMEN'S PAVILION
515 Madison Avenue
New York, N. Y. 10022

or call any time

(212) 371-6670 or (212) 371-6650
AVAILABLE 7 DAYS A WEEK

STRICTLY CONFIDENTIAL. We will make all arrangements for you and help you with information and counseling.

The publication and circulation of the February 8th issue of the Virginia Weekly were the direct responsibility of the Appellant.

The Appellant was arrested on the charge of unlawfully encouraging or prompting the procuring of abortion in violation of § 18.1-63 of the Code of Virginia, which provided as follows:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or in any other manner, encourage or prompt the procuring of abortion or miscarriage, he shall be guilty of a misdemeanor."[1]

The Appellant was tried in the County Court of Albemarle County on May 27, 1971, found guilty and given a fine of $500.00, of which $350.00 was suspended. Thereafter, the Appellant appealed to the Circuit Court of Albemarle County where, on June 15, 1971, he was given a *de novo* trial before the Court, having waived his right to trial by jury. For purposes of appeal to the Circuit Court, the parties entered into a stipulation of facts. (App. 18a-19a.)[2]

The Circuit Court found the Appellant guilty and fined him $500.00, of which $350.00 was suspended on condition that the Appellant not violate § 18.1-63 again. (App. 15a)

An appeal to the Supreme Court of Virginia was later perfected and a writ of error was granted to review the proceeding. (App. 16a-17a.) The Appellant raised two issues

[1] Effective July 1, 1972, § 18.1-63 was amended and now provides:

> "If any person, by publication, lecture, advertisement, or by the sale or circulation of any publication, or through the use of a referral agency for profit, or in any other manner, encourage or promote the processing of an abortion or miscarriage to be performed in this State which is prohibited under this article, he shall be guilty of a misdemeanor."

[2] Appendix references are to the Appendix to the Appellant's Jurisdictional Statement.

before the Supreme Court of Virginia: (1) whether the advertisement in question violated § 18.1-63 of the Code of Virginia and (2) whether § 18.1-63 was violative of the First Amendment either as applied or because it was overly broad.[3] (213 Va. at 193, 197, 191 S.E.2d at 174, 177; App. 3a and 9a.) That court rejected both contentions. First, it held that the advertisement "clearly exceeded an informational status" and "constituted an active offer to perform a service," and thus violated both the letter and intent of § 18.1-63. (213 Va. at 193, 191 S.E.2d at 174; App. 3a.)

Next, the court below held that the statute as applied did not violate the Appellant's First Amendment rights and stated: "The printed words, whether read literally or rhetorically, can only mean that the agency, for a fee, will make the necessary business arrangements with doctors and hospitals or clinics to secure an abortion for the customer. Thus, the commercial nature of both the advertiser and the advertisement is patently revealed." (213 Va. at 193, 191 S.E.2nd at 174-175; App. 4a.)

In authoritatively construing § 18.1-63, the Supreme Court of Virginia stated (213 Va. at 196-97, 191 S.E.2d at 176-77; App. 7a, 9a):

> "Focusing attention upon Code § 18.1-63, the statute here in question, we emphasize that it deals with abortion, a matter vitally affecting public health and welfare and in the important realm of medicine. It is clearly within the police power of the state to enact reasonable measures to ensure that pregnant women in Virginia who decide to have abortions come to their decisions without the commercial advertising pressure usually incidental to the sale of a box of soap powder. And the state is rightfully interested in seeing that Virginia

[3] The appellant did not press claims based upon the Ninth Amendment or the Vagueness Doctrine under the Fourteenth Amendment in either of the courts below.

women who do decide to have abortions obtain proper medical care and do not fall into the hands of those interested only in financial gain, and not in the welfare of the patient."

* * *

"It is against the evils of such practices as are disclosed by the New York cases that the advertisement restriction in Code § 18.1-63 is designed to protect. This state has a real and direct interest in ensuring that the medical-health field be free of commercial practices and pressures, and we hold that Code § 18.1-63 is a reasonable measure directed to that purpose. *Semler* v. *Dental Examiners, supra*, 294 U.S. at 612-13."

Finally, in refusing to strike down the statute as being violative of the First Amendment due to overbreadth, the Supreme Court of Virginia rejected Appellant's claim that § 18.1-63 is so broad "that a doctor who advises a patient that an abortion is appropriate, or a husband who encourages his wife to secure an abortion, or a lecturer who advocates a 'right to abortion' would all be guilty of misdemeanors." (213 Va. at 197-98, 191 S.E.2d at 177; App. 9a-10a.) The statute, as thus construed by the Supreme Court of Virginia, relates only to commercial solicitations for abortion services.

Thereafter, the Appellant filed a Jurisdictional Statement and the Appellee filed a Motion to Dismiss or Affirm with this Court (No. 72-932). This Court vacated the judgment and remanded the case to the court below for further consideration in light of *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). (413 U.S. 909; App. 20a.) Upon remand, the Supreme Court of Virginia again affirmed the Appellant's conviction and stated, (214 Va. at 342, 200 S.E.2d at 680; App. 22a):

"Bigelow's is a First Amendment case. He was convicted not of abortion but for running in his newspaper a commercial advertisement for a commercial abortion agency. We held that government regulation of commercial advertising in the medical-health field was not prohibited by the First Amendment. We find nothing in the new decisions of *Roe* v. *Wade* and *Doe* v. *Bolton* which in any way affects our earlier view. So we again affirm Bigelow's conviction."

ARGUMENT

The Questions Are Unsubstantial.

I.

A State, Exercising Its Police Powers To Protect The Health, Safety And Welfare Of Its Citizens, May Prohibit Commercial Advertisements Of Commercial Abortion Referral Agencies.

This case does not involve a woman's constitutionally protected right to terminate her pregnancy by abortion. *Roe* v. *Wade*, 410 U.S. 113 (1973) and *Doe* v. *Bolton*, 410 U.S. 179 (1973). Nor does it involve the traditional role of newspapers of communicating information and disseminating opinion. The evidence abundantly shows, and the Supreme Court of Virginia so found, that the advertisement in question is purely commercial in nature and that the advertiser is a commercial abortion referral agency. (213 Va. at 193-94, 191 S.E.2d at 174-75; App. 3a-4a.) And, as the Court also found, § 18.1-63 was enacted pursuant to the police power of the State to protect the health, safety and welfare of its citizens by ensuring that the medical-health field was free of commercial practices and pressures and that pregnant women obtain proper medical care. (213 Va. at 196-97, 191 S.E.2d at 176-77; App. 7a-9a.) To this end, the Supreme Court of Virginia construed § 18.1-63 to prohibit commercial solicitation of abortion services, including commercial advertisements by commercial abortion referral agencies. (213 Va. at 193, 196, 198, 191 S.E.2d at 174, 176-77; App. 3a, 9a-10a.) Thus, contrary to Appellant's conten-

tions, this case concerns only the authority of a state to regulate commercial advertising in the medical-health field. *Williamson* v. *Lee Optical Co.*, 348 U.S. 483 (1955); *Semler* v. *Dental Examiners*, 294 U.S. 608 (1935).

The authority of a state to regulate commercial advertising has been consistently and uniformly upheld in the face of First Amendment attacks. *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973); *Valentine* v. *Christensen*, 316 U.S. 52 (1942); *New York State Broadcasters Association* v. *United States*, 414 F.2d 990 (2nd Cir. 1969), *cert. denied*, 396 U.S. 1061 (1970); *Banzhof* v. *FCC*, 405 F.2d 1082 (1968), *cert. denied, sub nom., Tobacco Institute, Inc.* v. *FCC*, 396 U.S. 842 (1969); and *Capital Broadcasting Co.* v. *Mitchell*, 333 F.Supp. 582 (D. D.C. 1971), *aff'd sub nom., Capital Broadcasting Co.* v. *Acting Attorney General*, 405 U.S. 1000 (1972). While "freedom of communicating information and disseminating opinion" is entitled to the fullest First Amendment protection, "the Constitution imposes no such restraint on government as respects purely commercial advertising." *Valentine* v. *Christensen, supra*, at 54. Of course, "a newspaper will not be insulated from the otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas." *United States* v. *Hunter*, 459 F.2d 205, 212 (4th Cir. 1972), *cert denied*, 409 U.S. 934.

That the State has authority under its police power to protect the public health, safety and welfare of its citizens by prohibiting various modes of commercial advertising in the medical-health field is manifest. *Williamson* v. *Lee Optical Co., supra; Semler* v. *Dental Examiners, supra.* This the Appellant concedes (Jurisdictional Statement, p. 18): "There is no quarrel that the state has the power to regulate the provision of medical services and advertising by

those who provide such services." Moreover, while in both *Williamson* and *Semler* the advertisements were proscribed, the services advertised were legal. See *New York State Broadcasters Ass'n.* v. *United States, supra.*

Even in instances when abortions are legal, abortion referral agencies have been found to be soliciting patients for and splitting fees with doctors, *State* v. *Mitchell*, 321 N.Y.S.2d 756, 761 (1971), and to be acting as brokers in the sale of professional services, and even to be engaging in the practice of medicine. *State* v. *Abortion Information Agency, Inc.*, 323 N.Y.S.2d 597, 600-01 (1971). Obviously, advertising is the backbone of these abortion referral agencies. *S.P.S. Consultants, Inc.* v *Lefkowitz*, 333 F.Supp. 1373, 1377 (S.D. N.Y. 1971) (three-judge court). It was in light of these practices, which are demonstrably inimical to the public health, safety and welfare, that the Supreme Court of Virginia found that the advertisement restriction in § 18.1-63 was directed to "ensuring that the medical-health field be free of commercial practices and pressures" and to preventing "the evils of such practices as are disclosed by the New York cases." (213 Va. 197, 191 S.E.2d at 177; App. 9a.) See *Semler* v. *Dental Examiners, supra*, at 612-13.

II.

A Person, Whose Conduct Was Of A Purely Commercial Nature And Therefore Within The Hard Core Of Activity Prohibited By A Statute And Not Protected By The First Amendment, Does Not Have Standing To Raise The Hypothetical Rights Of Others Who Cannot Possibly Be Affected Because The Statute, Even Prior To Its Amendment, Was Authoritatively Construed To Forbid Only Commercial Activity.

The Appellant contends that he has standing to raise the hypothetical rights of others in challenging § 18.1-63 under the First Amendment as being overly broad. "He says that the statute is so broad that a doctor who advises a patient

that an abortion is appropriate, or a husband who encourages his wife to secure an abortion, or a lecturer who advocates a 'right to abortion' would all be guilty of misdemeanors." (213 Va. at 197, 191 S.E.2d at 177; App. 9a.) Application of the overbreadth doctrine in the context of this case, however, is unwarranted and improper.

The Appellant does not have standing to raise the hypothetical rights of others since his conduct in publishing and distributing a commercial advertisement for an abortion referral agency was squarely within the hard core of commercial activity prohibited by the statute and was not entitled to First Amendment protection. *United States* v. *Thirty-seven Photographs,* 402 U.S. 363, 378 (1971) (Harlan, J. concurring); *Breard* v. *City of Alexandria,* 341 U.S. 622 (1951). Moreover, facial overbreadth should not be invoked here because the Supreme Court of Virginia has placed a limiting construction on the challenged statute. *Broadrick* v. *Oklahoma,* 413 U.S. 601, 613 (1973). Authoritatively construing § 18.1-63, cf. *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942), the court below refused to give the statute a construction which would make it applicable to doctors advising patients, husbands encouraging wives to secure an abortion, or lecturers advocating the right to an abortion. Rather, it construed the statute to apply only to commercial solicitation of abortion referral services. (213 Va. at 198, 191 S.E.2d at 177: App. 9a-10a.)[4]

[4] The Appellant relies upon *Mitchell Family Planning, Inc.* v. *City of Royal Oak,* 335 F.Supp. 738 (E.D. Mich. 1972). His reliance upon *Mitchell,* however, is wholly misplaced. The city ordinance in that case banned the advertising of *"any information* concerning the producing or procuring of an abortion." (Emphasis added.) Furthermore, the advertisement in question in that case referred solely to information concerning abortion and did not contain any language which could have been construed as a solicitation on the part of a referral agency. *Mitchell* is manifestly inapposite.

Furthermore, as previously noted, *supra,* p. 4, n. 1, the statute under which the Appellant was convicted has been drastically amended. Therefore, this is not a situation in which "the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights," *Coates* v. *City of Cincinnati,* 402 U.S. 611, 620 (1971) (White, J., dissenting), if indeed, it ever did. A blind application of the overbreadth doctrine in this case could not conceivably affect the rights of anyone not before the court.

CONCLUSION

For the reasons set forth above, Appellee respectfully submits that the appeal should be dismissed or the judgment affirmed.

Respectfully submitted,

ANDREW P. MILLER
Attorney General

ANTHONY F. TROY
Deputy Attorney General

D. PATRICK LACY, JR.
Assistant Attorney General

Supreme Court–Library Building
1101 East Broad Street
Richmond, Virginia 23219

Attorneys for Appellee

March 27, 1974

CERTIFICATE OF SERVICE

I, D. Patrick Lacy, Jr., Assistant Attorney General of Virginia, a member of the Bar of the Supreme Court of the United States and one of counsel for the Commonwealth of Virginia in the above captioned matter, hereby certify that three (3) copies of this Motion to Dismiss or Affirm have been served upon each of counsel of record for the parties herein by depositing the same in the United States Post Office with first class postage prepaid, this the 27th day of March, 1974, as follows:

Melvin L. Wulf, Esquire
Joel M. Gora, Esquire
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

John C. Lowe, Esquire
F. Guthrie Gordon, III, Esquire
Lowe and Gordon
1111 West Main Street
Charlottesville, Virginia 22901

Attorneys for Appellant

D. PATRICK LACY, JR.
Assistant Attorney General